No. _____

In the Supreme Court of the United States

MARK UNGER,

Petitioner,

v.

DAVID BERGH, Warden,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Mark Unger's murder conviction rests on expert testimony that the decedent, his wife, survived for at least 90 minutes following trauma to her head. There was no scientific foundation for this testimony—it was classic junk science. Had trial counsel performed a basic investigation—such as reading the articles that supposedly supported the testimony—counsel could have excluded the testimony altogether.

The question presented is:

Whether the Sixth Amendment guarantee of effective assistance of counsel is violated when counsel fails to expose junk science that sends his client to prison for the rest of his life.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Unger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Sixth Circuit affirming the denial of habeas relief is reproduced at Appendix A. The unpublished decision of the United States District Court for the Eastern District of Michigan denying habeas relief is reproduced at Appendix B. The order of this Court denying Petitioner's petition for a writ of certiorari on direct review is reproduced at Appendix C. The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal is published at 495 Mich. 947 and is reproduced at Appendix D. The unpublished order of the Michigan Court of Appeals denying Petitioner's application for leave to appeal is reproduced at Appendix E. The Benzie County (Michigan) Circuit Court's unpublished written opinion and judgment is reproduced at Appendix F. The same court's unpublished order denying Petitioner's motion for relief from judgment is reproduced at Appendix G.

JURISDICTION

The Sixth Circuit affirmed the Eastern District of Michigan's denial of the Petitioner's habeas petition on July 10, 2018. On September 27, 2018, Justice Kagan extended the time for filing a petition for a writ of certiorari to December 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Sixth Circuit had jurisdiction under 28 U.S.C. § 2253(c). The

district court had jurisdiction over the final judgment of the Michigan Supreme Court under 28 U.S.C. § 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Section 2254(d) of Title 28 of the U.S. Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

1. Florence Unger was found dead in a lake at a rustic northern Michigan resort. To many, it looked like a tragic accident: Under a dark, new-moon October sky, up on a mossy deck perched above an old boathouse, Mrs. Unger had lugged a heavy wooden chair closer to the edge, for better views of the lake. She lost her grip and stumbled. Behind her lurked a wobbly, rotted railing standing mid-thigh, well below code. She toppled over the railing, plummeting 12 feet to a concrete ledge below. Her head hit the ledge, and she tumbled, unconscious, into the lake. The innkeeper found her lifeless body there the next morning. Observers remarked that the old boathouse deck was an "accident waiting to happen." (RE 10-14, Page ID # 2596.)

But the Ungers were going through a divorce, so the police quickly turned their attention to the husband, Mark Unger. Mr. Unger passed a polygraph, but the prosecution decided to charge him with first-degree murder anyway. (RE 12-7, Page ID # 3240.)

2. The prosecution's case at trial centered on testimony from a University of Michigan neuropathologist, Dr. Paul McKeever. Dr. McKeever conducted a neurofilament (NF) staining test of Mrs. Unger's brain, and discovered, he said, axonal injury. (RE 10-7, Page ID # 2297.) Axonal injury, he explained to the jury, does not appear unless there is significant time between trauma and death. (*Id.*) Dr. McKeever proclaimed to the jury that the presence of axonal injury meant, with medical certainty, that Mrs. Unger was alive for at least an hour and a half after her head hit the concrete ledge and before she died in the water. (*Id.*)

3. This, the prosecution told the jury, was "the one thing the defense can't get around." (RE 10-18, Page ID # 2752.) If Mrs. Unger was alive on that ledge for an hour and a half before she reached the lake, the defense's theory could not possibly be true. This was no tragic accident. (*See id.*) This was cold-blooded, premeditated murder. (*See id.*) Mark Unger pushed her off the deck, left her unconscious on the ledge below, "gurgling in her own blood," and then "waited for the coast to be clear," so he could "sneak back down, like a rat in the night," to deliver the cold-blooded coup-de-grâce, dragging her into the lake to die. (*Id.* at 2738, 2742.) They knew all of this, the prosecutor told the jury, because Dr. McKeever had told them Mrs. Unger was alive for at least an hour and a half after the fall. (*See id.*)

4. It turns out that there was no scientific foundation for Dr. McKeever's testimony. Dr. McKeever testified that he based his theory entirely upon his review of certain medical articles. (RE 10-7, Page ID # 2297.) But none of the articles even purports to analyze whether a positive NF stain proves that a decedent lived a minimum of 90 minutes after trauma. (*See* RE 20, Page ID # 5735-6106.) Two leading neuropathologists confirmed in post-conviction proceedings that there is no literature anywhere in the world concluding that a positive NF result correlates to *any* minimum survival time. (*See* RE 13-2, Page ID # 3849-50, RE 13-3, Page ID # 3927.) And the State of Michigan has conceded that, "True, a positive NF stain was not linked to a 90 minute survival time in the literature relied upon by Dr. McKeever[.]" (Respondent's Sixth Cir. Br. at 23.)

Trial counsel, however, had no recollection of ever reading the articles, despite having received them about six months before trial. (RE 13-4, Page ID # 4033-34.) Thus he failed to move to exclude Dr. McKeever's testimony, failed to challenge Dr. McKeever's testimony during cross-examination, and failed to provide the articles to his own expert to effectively rebut Dr. McKeever's testimony. (*See id.*)

5. With Dr. McKeever's testimony left effectively unrebutted, the prosecution made the 90-minute-survival testimony the centerpiece of its case. The prosecution referenced this testimony 19 times in its closing arguments, and told the jury three times that Dr. McKeever's testimony was "the one thing the defense can't get around." (RE 10-18, Page ID # 2752.)

6. After hearing all that, the jury convicted Petitioner of first-degree murder. (RE 12-3, Page ID # 3033.) The trial court sentenced Petitioner to mandatory life in prison without the possibility of parole—the maximum penalty permitted by Michigan law.

7. Following his direct appeals, Petitioner filed a motion for relief from judgment based on ineffective assistance of counsel. Two leading neuropathologists confirmed that the articles Dr. McKeever relied on do not support the 90-minute-survival testimony. Dr. Colin Smith, perhaps the leading trauma neuropathologist in the world, testified that there is no literature finding that NF stains can be translated into survival times. (RE 13-2, Page ID # 3889.) He testified that the positive NF result is "meaningless" with respect to how long Mrs. Unger may have survived following the trauma to her head. (*Id.*) Dr. Smith

confirmed that a positive NF result could in fact be consistent with the defense theory, because although the stain results suggest some post-trauma survival time, it could be very short—"almost instantaneous death." (*Id.* at 24, 33-34, 191.) Dr. Smith also noted that another staining test used by Dr. McKeever, the gold standard in the field, found no evidence of axonal injury at all. (*Id.* at 27-28.)

8. Mr. Unger's trial counsel admitted his error in post-conviction proceedings. He hedged about whether he specifically remembered reading the articles, but he admitted that he "should have" exposed the lack of support for Dr. McKeever's testimony by asking him to identify the articles that supposedly supported it. (RE 13-4, Page ID # 4033-34.) Appellate counsel also admitted that he erred in failing to raise this issue on direct appeal. (*Id.* at 617-18, 651-53.)

9. The Michigan trial court denied Petitioner's ineffective-assistance claim on post-conviction review, holding that trial counsel's failure to expose Dr. McKeever's junk science was "strategic." (RE 13-10, Page ID # 4500.) The court adjudicated the claim on the merits, and did not enforce any procedural bar. (*See id.*) The Michigan Court of Appeals and Michigan Supreme Court thereafter denied leave to appeal. (*See* App. D, E.) This Court denied certiorari on October 14, 2014. (App. C.)

10. Petitioner filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Michigan. The court denied the petition, but held that reasonable jurists could disagree with this conclusion and granted a certificate of appealability. (App. B.)

11. Petitioner appealed to the Sixth Circuit, but the court affirmed the denial of habeas relief. (App. A.)

REASONS FOR GRANTING CERTIORARI

Mark Unger is sitting in prison for the rest of his life because his lawyer failed to expose the junk science that put him there. The State's expert, Dr. McKeever, testified that, based on his review of a stack of medical articles, a positive neurofilament (NF) stain meant Mrs. Unger had to have been alive for "at least an hour-and-a-half" after her fall. But the State admits that, "True, a positive NF stain was not linked to a 90 minute survival time in the literature relied upon by Dr. McKeever." (State's Sixth Cir. Br. at 23.) The State of Michigan, in other words, *concedes* that Dr. McKeever's testimony was junk science.

Mr. Unger's counsel's failure to expose that junk science is classic ineffective assistance of counsel. Had counsel even skimmed the articles Dr. McKeever claimed to have relied on, he would have quickly realized that Dr. McKeever's testimony was junk science through and through. The articles say *nothing* linking a positive NF stain to any minimum survival time, much less 90 minutes. But counsel failed to perform a basic investigation, and thus Dr. McKeever's junk science reached the jury effectively unchallenged. This is clear-cut "deficient performance" under this Court's precedent. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005).

Counsel's failure to expose the junk science also "prejudiced"—indeed devastated—Mr. Unger's defense. *Strickland*, 466 U.S. at 688. Simply put, Dr.

McKeever's testimony was game-over for Mr. Unger. If Mrs. Unger had been alive for 90 minutes after her fall, Mr. Unger's defense could not possibly be true. The prosecution told the jury three times during closing arguments that this testimony was "the one thing the defense can't get around." They were right. Left unchallenged, Dr. McKeever's junk science sunk Mr. Unger's defense. There is certainly a "reasonable probability" that it did, which is all the *Strickland* standard requires. 466 U.S. at 694.

The lower courts' conclusion to the contrary was not just wrong, it was unreasonable. The only reasonable conclusion is that trial counsel's failure to exclude Dr. McKeever's junk science is why Mr. Unger is sitting in a prison cell for the rest of his life.

Petitioner recognizes that this Court is generally not an error-correcting court. There is no circuit split here, and the Sixth Circuit did not break new legal ground in its unpublished decision. But Petitioner submits that this is an exceptional case that well warrants this Court's attention, through summary reversal or otherwise. Michigan is not a death-penalty state, so Petitioner received the maximum possible punishment permitted by law—life without the possibility of parole. The State has admitted that it used junk science to secure Petitioner's conviction. The State also admitted at trial that, without this junk science, it had at best a second-degree-murder case, not a first-degree one. So the only reasonable conclusion from the record is that the reason Petitioner is sitting in a jail cell for the rest of his life is because his lawyer failed to protect him from the State's junk science. These are extraordinary circumstances indeed.

The Court's review in this case would also make clear to the lower courts that the Sixth Amendment plays a critical role in protecting *all* criminal defendants—not just Mr. Unger—from junk science. The Court noted in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) that "[o]ne study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." The Court recently highlighted in *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) the "threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensic experts[.]" The Court should grant review to confirm the critical role the right to counsel plays to protect innocent defendants from conviction based on junk science.

I. Habeas Relief is Warranted When a Lawyer Fails to Expose or Exclude Junk Science Offered by the Prosecution's Key Expert Witness

A. The Michigan courts unreasonably applied clearly established federal law by holding that trial counsel's failure to expose junk science was effective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees to every criminal defendant the effective assistance of counsel. To establish an ineffective-assistance claim, a defendant must show that counsel's performance was "deficient"—it "fell below an objective standard of reasonableness"—and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Strickland*, 466 U.S. at 687-88.

The Court has made clear that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier,* 477 U.S. 478, 496 (1986). This includes an error in investigating the case: counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In *Rompilla*, the Court explained that this duty at a minimum requires trial counsel to perform basic investigation into obvious sources of key prosecution evidence. The Court explained that it "flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking." 545 U.S. at 389.

Here, trial counsel's failure to exclude Dr. McKeever's junk science was clear-cut deficient performance. Dr. McKeever testified on direct examination that, based on his review of certain medical articles, a positive NF stain meant Mrs. Unger had to have been alive for "at least an hour-and-a-half" after the fall. (RE 10-7, Page ID # 2297.) But as the State now admits, the articles did not support that conclusion. (*See* Appellee's Br. at 23: "True, a positive NF stain was not linked to a 90 minute survival time in the literature relied upon by Dr. McKeever[.]")

For a properly prepared lawyer, what to do next would have been an easy call. Defense counsel could have moved to exclude Dr. McKeever's junk science

altogether, or could have destroyed his testimony on cross-examination. But it is undisputed here that defense counsel did neither. Instead he just, as the State puts it, "poked" a few "holes" in McKeever's testimony, probed "around the margins," "making a few points" before "moving on," because he wanted to avoid any "rancor" with McKeever. (State's Sixth Cir. Br. at 28.) This was ineffective assistance of counsel: When defense counsel in a murder trial faces a choice between outright eliminating or destroying "the one thing the defense can't get around," on the one hand, or poking at the margins to avoid upsetting the witness, on the other, it is never reasonable trial strategy to choose the latter over the former.

The Michigan courts misapplied *Strickland* and *Rompilla* by labeling trial counsel's failure to expose Dr. McKeever's junk science "strategic" without analyzing the basis for that supposed strategy. As this Court made clear in *Strickland,* "[c]ounsel has a duty to make reasonable investigations," and "strategic choices made after less than complete investigation" are reasonable only "to the extent that reasonable professional judgment support the limitation of the investigation." 466 U.S. at 690-91. Any minimally competent lawyer would have read the articles McKeever relied on and used them to eliminate the prosecution's key testimony from the case. Because trial counsel here failed to do this, his representation "fell below an objective standard of reasonableness." *Id.* at 687.

The Sixth Circuit likewise failed to follow *Strickland*. The Sixth Circuit speculated that trial counsel may in fact have read the articles, since he

testified that he could not clearly remember either way. But speculation that trial counsel may have read the articles (but had simply forgotten about them later, apparently) does not excuse trial counsel's deficient performance—it underlines it. If trial counsel had indeed read the articles purportedly supporting Dr. McKeever's testimony, he would have immediately realized that they did not discuss or support Dr. McKeever's conclusions in any way. And if he read the articles yet chose to do nothing with the knowledge that McKeever's testimony was junk science, this would not render his performance any better. It might be worse.

Counsel's deficient performance "prejudiced the defense." *Strickland*, 466 U.S. at 687. To satisfy the prejudice standard, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Dr. McKeever's testimony was the centerpiece of the prosecution's case. The prosecution built its whole timeline, its whole story, its whole theory of the case on Dr. McKeever's testimony that the positive NF stain meant Mrs. Unger must have survived at least an hour and a half after the fall. The prosecution told the jury that, since Mrs. Unger was alive for an hour and a half, "the only thing that makes any sense," "the only thing consistent with the medical evidence," is that Unger had "waited for the coast to be clear" after he pushed his wife off the deck. (*See* RE 10-18, Page ID # 2738.) He "regroup[ed]" and "plan[ned] out his course of

action," for "at least an hour-and-a-half, probably a little bit longer," while his wife lay "unconscious, immobile, and bleeding." (*Id.* at Page ID # 2738, 2742.) Unger then "sneak[ed] back down, like a rat in the night," and dragged her, while she was "still alive," "gurgling in her own blood," into the water to die. (*See* RE 10-18, Page ID # 2738, 2742, 2802.)

The jury knew *all* of this, the prosecution repeatedly told the jury, because McKeever told them Mrs. Unger had to have been alive for at least 90 minutes after the fall. This, the prosecution told them—three times for emphasis—was "the one thing the defense can't get around." (*Id.* Page ID # 2752-53.) And that meant this was no hot-blooded crime of passion—"That's second-degree murder." (RE 10-19, Page ID # 2802-03.) No, this was revenge of a much more brutal and cold-blooded nature. This was premeditated, first-degree murder, perpetrated by a subhuman monster. (*Id.*)

Had defense counsel performed even a basic investigation into the articles supposedly supporting Dr. McKeever's testimony, the jury would have heard *none* of this. A minimally prepared counsel could have excluded Dr. McKeever's unreliable opinion because it lacked the required foundation, and that would have fundamentally reshaped the trial. Or he could have destroyed Dr. McKeever on cross-examination, also transforming the course of the trial.

Indeed, the prosecution *conceded* at trial that, without Dr. McKeever's testimony, their evidence supported only a *second*-degree murder charge, not first degree. The prosecution told the jury during closing argument that "No one is saying that Mark Unger, when he was up on the deck, premeditated the

killing of Florence Unger." (RE 10-19, Page ID # 2802-03.) The prosecution conceded: "That's second-degree murder." (*Id.*) The prosecution told the jury that "[p]remeditation comes from the fact that *after* Florence Unger crashed [off] that deck . . . the defendant, Mark Unger, made a conscious decision to *move her* into that water[.]" (RE 10-18, Page ID # 2756; emphasis added.) "*That is premeditation*. And that is deliberation, and *that is first-degree murder*." (*Id.* at Page ID # 2802-03; emphasis added.) The prosecution therefore conceded that, without the hour-and-a-half testimony—the testimony that established the "regrouping," "planning," and "sneaking like a rat in the night" time—it could not have sustained a first-degree murder charge.

The lower courts seem to have been confused about whether there was another stain, the NSE stain, that might have supported a survival-time conclusion even if the NF stain did not. The courts seemed to believe that, even though there was no support in the literature for the 90-minute-survival conclusion using the NF stain, there might be some support for that conclusion using an NSE stain. But this is just fundamentally wrong. First, both Dr. McKeever and the prosecution expressly and repeatedly disclaimed any reliance on the NSE stain. (*See, e.g.*, RE 10-7, Page ID # 2308.) Second, and likely for this same reason, there was *no* evidence introduced at trial that an NSE stain correlated to any minimum survival time, 90 minutes or otherwise. Finally, that evidence just does not exist. There is no evidence in this case—or anywhere else in the world—that *any* stain can calculate a survival time. As the world's leading trauma neuropathologist confirmed in post-conviction

proceedings, we simply "cannot time injuries pathologically." (*See* RE 13-2, Page ID # 3890.) We can't do it with the NF stain, we can't do it with the NSE stain; we just "cannot do it." (*Id.*) The lower courts were therefore wrong to rely on this nonexistent evidence to deny Mr. Unger's claim.

The lower courts were also wrong that the prosecution's "other" (non-McKeever) evidence warranted denying Mr. Unger's claim. All of this other evidence—stuff like a dime-novel theory that Mrs. Unger would not have been on the deck alone because she was afraid of the dark, a paint smudge on a shoe, and equivocal blood-spot evidence—was neutralized at trial. If anything, what all of this second-string evidence highlights is just how powerful it would have been to the jury, after hearing all this fluff, to hear seemingly scientific, confidently announced, repeatedly emphasized testimony from a University of Michigan neuropathologist that, as a matter of medical certainty, Mrs. Unger was alive for at least 90 minutes after the fall. And given the prosecution's repeated concession that Dr. McKeever's testimony was the "one" thing the defense couldn't get around, the prosecution's "other" evidence is largely beside the point. This was all the stuff the defense *could* get around.

In the end, the prosecution was right that Dr. McKeever's testimony was the "one thing the defense can't get around." Unger's trial counsel neutralized all of the prosecution's "other" evidence, but failed to challenge McKeever's. That failure was textbook ineffective assistance of counsel and prejudiced—indeed destroyed—Unger's defense. By concluding

otherwise, the lower courts unreasonably applied *Strickland*, and habeas relief is warranted.

B. Whether counsel's unreasonable failure to investigate and expose "junk science" violates the Sixth Amendment right to counsel is a question of exceptional importance.

This Court's precedents show that reliability of convictions in the criminal justice system is of utmost importance. *See, e.g.*, *Strickland*, 466 U.S. at 687. Increases in technology have led to the use of forensic evidence to both strengthen the reliability of convictions and overturn unreliable ones. Forensic evidence "has led to an extraordinary series of exonerations, not only in cases where the trial evidence was weak, but also in cases when the convicted parties confessed their guilt and where the trial evidence against them appeared overwhelming." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 98 (2009) (Stevens, J., dissenting). Indeed, "abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants[.]" *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

Forensic evidence is not always used for good. Laboratory standards are not foolproof or always properly applied. *See Williams v. Illinois*, 132 S. Ct. 2221, 2250 (2012) (Breyer, J., concurring). "It is not difficult to find instances in which laboratory procedures have been abused." *Id.* Indeed, "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Pamela R.

Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 491 (2006) *quoted in Melendez-Diaz*, 557 U.S. at 319. Forensic evidence itself has therefore become necessary to "exonerate[] some defendants who previously had been convicted in part upon the basis of testimony by laboratory experts." *Williams*, 132 S. Ct. at 2250 (Breyer, J., concurring).

This Court has recognized the extraordinary force of scientific testimony from expert witnesses. "Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrel Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). Thus "[e]xpert evidence can be both powerful and quite misleading[.]" *Id.* at 595. Given the extraordinary weight juries attribute to unchallenged expert-witness testimony, along with the alarming rate of exonerations due to "junk science," it is important that this Court clarifies the duties of counsel in cases with forensic experts.

This Court recently opined on counsel effectiveness in a case much like Petitioner's, where "junk science" was used to secure a conviction. *See Hinton*, 134 S. Ct. 1081. In *Hinton*, the Court was called upon to decide whether the Alabama courts correctly applied *Strickland*. 134 S. Ct. at 1083. Although three extremely experienced postconviction defense experts found that firearm and toolmark evidence used to convict Hinton was inconclusive, the State's experts at trial "maintained that all six bullets had indeed been fired from the Hinton revolver." *Id.* at 1085, 1086. At trial, defense counsel offered testimony by the only affordable "expert" available to Hinton. *Id.* at 1085.

Because Hinton had a right to funds for a credible expert, but counsel failed to secure those funds and instead presented an easily discredited expert, Hinton did not receive effective assistance of counsel. *Id.* This Court held that the "trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." *Id.* at 1088. Knowing he needed funding to be effective, counsel "failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for $1,000 but for 'any expenses reasonably incurred.'" *Id.* at 1089.

Petitioner here received similarly ineffective assistance of counsel when his trial counsel failed to read the articles that purportedly supported the testimony on which his conviction rests. At least a cursory review of those articles was necessary to effectively assist Petitioner, and would have transformed the course of this case. By neglecting to read the articles, trial counsel failed to undertake a reasonable investigation to support his purportedly "strategic" choices. Petitioner now faces life in prison without the possibility of parole based on a conviction that rested on "junk science."

Given this Court's recent emphasis on exonerating innocent defendants and reducing the prevalence of "junk science," the Court should clarify counsel's duty to investigate in prosecutions relying on forensic expert testimony. The Sixth Amendment and this Court's precedents suggest that failing to effectively counter

readily disprovable "junk science" incarcerates innocents and violates the right to counsel. The Court should grant review to confirm the critical role that the right to counsel plays to protect against the conviction and incarceration of innocent defendants by junk science.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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